No. 82-384

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In The

Supreme Court of the United States

October Term, 1982

RICHARD L. STACK,

Petitioner,

vs.

CAPITAL-GAZETTE NEWSPAPERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Court of Appeals of Maryland correct in affirming the directed verdict granted respondent when the court found upon a careful examination of the record that petitioner produced no evidence from which the trier of fact could infer that the publisher acted with reckless disregard of the truth of its editorial statements and when the court expressly found both that the evidence showed that the publisher acted on a reasonable belief that the statements in the editorial were substantially correct and that there was no evidence to impeach the publisher's good faith?[1]

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1. Pursuant to Supreme Court Rule 28.1, Capital-Gazette, Inc., states that Landmark Communications, Inc., a Virginia corporation, owns a substantial minority interest in Capital-Gazette. Respondent has no affiliates or partially owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Capital-Gazette Newspapers, Inc. ("Capital-Gazette"), respectfully requests that this Court deny the petition for certiorari filed by Richard Stack ("Stack"). Stack asks this Court to review the decision of the Court of Appeals of Maryland affirming the decision of the Circuit Court for Anne Arundel County, Maryland. The decision of the Court of Appeals is reported at 293 Md. 528, 445 A. 2d 1038 (1982).

STATEMENT OF THE CASE

This libel action brought by Stack against Capital-Gazette seeks damages for an editorial published on October 26 and 27, 1978, in two of respondent's newspapers. That editorial endorsed H. Erle Schafer for election to the Maryland Senate over Stack, Schafer's opponent.

The editorial read as follows:

DISTRICT 32

THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics — all because of the tactics of Republican challenger Richard Stack.

After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

Instead, Stack chose to take the low road — a la former Sen. Joseph McCarthy. He has been conducting a campaign of smears and innuendos in attempting to divide the district's many Democrats.

Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations, Stack not

only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del. Tyras Athey, was on his side.

Both allegations have proven to be false — as have many other things Stack has said in the campaign.

Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

The overwhelming choice here is Schafer. Stack does not belong in public office.

The editorial was written by respondent's executive editor, Edward Casey. The opinion of the Court of Appeals noted Casey's widespread investigation of the candidates before he wrote the editorial:

> [He] had observed Stack at the 19 October 1978 candidate endorsement meeting and, therefore, had some personal knowledge of him. Before writing the editorial, Casey undertook a substantial investigation of the campaign. He examined the background and experience of each of the

> candidates. He reviewed various news stories written during the campaign. He solicited candidate endorsements from others. He noted that Stack did not have a platform, had on occasion refused to discuss issues, and had on occasion refused to answer questionnaires. He was present when Stack asserted that prominent Democrats were supporting him as well as when those Democrats subsequently denied the assertion. He believed the Democrats and concluded that Stack had made a false statement. He reviewed an ad used by Stack that he believed contained untruths designed to vilify Schafer.

445 A. 2d at 1045 (Petition for Certiorari at 31a-32a).

Stack filed suit following publication. After discovery by both parties, a jury trial was held, Judge Raymond Thieme presiding. At the close of all the evidence Judge Thieme granted Capital-Gazette's motion for a directed verdict. Stack appealed that decision to the Court of Special Appeals, which reversed the trial court and remanded for a new trial. The Court of Appeals then granted Capital-Gazette's petition for a writ of certiorari. In an opinion w 'en by Judge Rita Davidson, handed down on June 4, 1982, the Court of Appeals reversed the intermediate court and affirmed the decision of the trial court. Stack then filed this petition.

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below was based on the routine application of well-settled law. Petitioner, a public figure, unable to produce any of the evidence of actual malice required by the clear decisions

of this Court, simply asserts that, as a matter of federal constitutional law, the state court should have permitted a jury to hear his case. That assertion is supported by neither precedent nor policy. Hence, the courts below correctly held that the failure to produce evidence of actual malice precluded petitioner from taking his case to the jury.[2]

The Court of Appeals of Maryland correctly affirmed the trial court's grant of a directed verdict for respondent when petitioner failed to introduce any evidence establishing actual malice on the part of respondent.

The decision of the Court of Appeals raises no new legal issues. That decision, to the contrary, rests on established constitutional principles laid down by this Court over the past two decades, "principles," Judge Davidson observed, that "have been frequently reiterated by the Supreme Court." 445 A. 2d at 1044 (Petition for Certiorari at 29a).

In particular, this case involves the requirement that Stack, concededly a public figure (Petition for Certiorari at 17), must establish actual malice before he can be awarded damages, and that "actual malice" can be established only by evidence that the publisher had a high degree of awareness of probable falsity concerning his statements, or that their publication, absent further investigation, demonstrated a lack of good faith. *Herbert v. Lando*, 441 U.S. 153 (1979); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

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2. Because the Court of Appeals found insufficient evidence of actual malice to permit the case to go to the jury, it did not consider Capital-Gazette's contention that the editorial was both constitutionally protected opinion and protected under the state law of fair comment. *See* 445 A. 2d at 1046 n.1 (Petition For Certiorari at 35a-36a).

Stack had numerous opportunities, through pre-trial discovery, the presentation of direct evidence and cross-examination to establish the malice required by *New York Times v. Sullivan*. This he failed to do.

The significance of that failure is made clear in Judge Davidson's opinion. The Court of Appeals, following a lengthy review of the law developed by this Court and the facts developed at trial, held:

> We can only conclude that *there was insufficent evidence from which a trier of fact could find or infer* that the publisher had a high degree of subjective "awareness of [the] probable falsity" of the editorial statements or that it had "serious doubts as to the truth" of the editorial statements or that it "knew or had reason to suspect" that the editorial statements were false.

445 A. 2d at 1045-46 (Petition for Certiorari at 35a) (emphasis added). The trial judge agreed. In his opinion granting a directed verdict for respondent, Judge Thieme said: "I just find that there is no evidence that would permit the trier of fact to draw the conclusion that the, Casey entertained serious doubts as to the truth of his publication." (Petition for Certiorari at 77a).

The evidence amply demonstrates the correctness of those holdings. "[T]he record," Judge Davidson observed, "does not show that Casey was aware of any falsity in the editorial." 445 A. 2d at 1045 (Petition for Certiorari at 34a). Further, Casey, before writing the editorial, "undertook a substantial investigation of the campaign." *Id.* (Petition for Certiorari at 31a). That investigation, Judge Davidson wrote, "shows that Casey acted on a reasonable belief that the statements in the editorial were substantially correct. *There was no evidence* to impeach Casey's

good faith." *Id.* (Petition for Certiorari at 32a-33a) (emphasis added). Finally, the thorough analysis of the evidence by Judge Davidson makes clear that there were factual bases for every statement made in the editorial. Because Stack failed to produce evidence from which the finder of fact could infer actual malice, there was nothing for the jury to consider. Hence, the directed verdict on behalf of respondent was proper.

To avoid his failure to introduce any such evidence, Stack contends that issues of credibility, especially in defamation cases, should not be resolved by directed verdict or summary judgment. That argument, in the context of this case, is clearly a red herring because petitioner did not produce sufficient evidence to raise, under the standards elaborated by this Court, any question concerning Casey's good faith. As *St. Amant v. Thompson* clearly held, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 731.

Petitioner's argument would stand *St. Amant* and *New York Times* on their heads, for it would give any plaintiff in any defamation case the right to recover damages in the absence of *any* factual evidence from which a finder of fact could infer that the writer of the article had entertained serious doubts concerning its veracity. Stack would permit recovery based on mere speculation in the absence of independent evidence. That speculation would hardly provide the "clear and convincing proof" of actual malice required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Unless a plaintiff is required to introduce constitutionally sufficient evidence of malice, the protection accorded defamation defendants by *New York Times* and *St. Amant* could be stripped from them by a hostile jury.

Contrary to Stack's assertion, the decision of the Court of Appeals does not disturb the constitutional balance struck by *New*

York Times and its progeny. Nothing in Judge Davidson's opinion suggests that the Court of Appeals interpreted that line of cases as precluding recovery except where the publisher admits to knowing falsity or reckless disregard for the truth. Rather, the Court of Appeals expressly reaffirmed that a jury question is presented on the issue of reckless disregard for the truth, notwithstanding the writer's protestation of good faith, not only when there is a showing that "a defamatory statement was a calculated falsehood or lie knowing and deliberately published," but, in addition, when there is a showing that:

> a defamatory statement was the product of the publisher's imagination; a defamatory statement was so inherently improbable that only a reckless person would have put it in circulation; or the publisher had obvious reasons to distrust the accuracy of the alleged defamatory statement or the reliability of the source of the statement. . . .

445 A. 2d at 1044 (Petition for Certiorari at 26a-27a) (citation omitted).

The Court of Appeals, in applying those tests, merely held that the trial court had correctly found the record devoid of evidence sufficient to permit a trier of fact to find or infer that Casey had reason to suspect that his statements were false. Accordingly, Casey's credibility or good faith was not at issue. Clearly, however, the Court of Appeals, in conformity with this Court's rulings, has left the door open for a plaintiff to get his case to the jury when there is sufficient circumstantial evidence from which it could be inferred that the publisher's statements were made with the requisite malice.

Petitioner indicates that Casey could have conducted an even more thorough investigation, describing specific alleged omissions.

The Court of Appeals carefully considered this evidence and found that Casey's omission, in light of his having undertaken a "substantial investigation," would at most support "a finding of negligence." 445 Md. at 1045 (Petition for Certiorari at 34a-35a). Negligence, however, does not establish actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964).

Stack, in essence, has asked this Court to review his case for the purpose of establishing a blanket rule that a directed verdict is *always* inappropriate in a defamation case, a rule to be applied even when, as here, the trial court finds there is no evidence that would permit the jury to draw the conclusion that the writer entertained serious doubts about the truth of his publication. Petitioner would permit the jury to infer the constitutionally requisite "serious doubts" by speculating with regard to the credibility of the writer. He would permit such speculation in the absence of independent evidence that would allow a finding that the writer wrote with actual malice. Such a rule does not exist elsewhere in our law, and the creation of a unique rule for defamation actions would be contrary both to precedent and the First Amendment.

In affirming the trial court's grant of a directed verdict the Court of Appeals correctly followed this Court's longstanding precedents in determining whether the evidence presented at trial satisfied the constitutional requirements of a defamation action.[3]

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3. Stack's attempt to attach significance to the failure of the trial court to grant a directed verdict after the close of plaintiff's evidence, granting it only after the close of all of the evidence, is misplaced. The trial court could easily have decided, as trial judges often surely do, to deny the motion even if the technical requirements for granting it had been met. The opportunity of Stack to establish actual malice by cross-examination of Capital-Gazette's witnesses can be viewed as an extension of the opportunity presented by *Herbert v. Lando* to inquire into the knowledge that the writer of the editorial in question had at the time the editorial was written. The failure of Stack to elicit on cross-

(Cont'd)

That determination by two courts concerning the sufficiency of the evidence raises no new questions of law for this Court to review.

Accordingly, the opinion of the Court of Appeals raises no questions of constitutional dimension. In *New York Times* and its progeny this Court reconciled the competing interests of state defamation law and the First Amendment. This Court's primary concern has been to define the nature of the constitutional privilege necessary to protect free speech guaranteed by the First Amendment from the restraints imposed by the common law of defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 334. State law is of constitutional significance only to the extent that it interferes with rights granted by the First Amendment. Accordingly, the standards employed by a state court in considering a motion for a directed verdict are not of constitutional significance unless those standards impinge upon the protection granted defendants under *New York Times* and subsequent cases. Where a state court, in accordance with its rules of procedure, determines that the evidence is insufficient for the jury to find that state defamation law has been violated, no constitutional issue is raised under the First Amendment.

Stack argues, finally, that the Court of Appeals misconstrued its own precedent, *Berkey v. Delia*, 287 Md. 302, 413 A. 2d 170 (1980). Failure of a state court to follow its own precedents does not provide a proper basis for review by this Court. In any event, the Court of Appeals did not misconstrue its own precedent. *Berkey* involved the propriety of granting summary

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(Cont'd)

examination any such knowledge surely makes clear that the trial judge correctly granted respondent's motion for a direct verdict. The issue, in short, was not one of the credibility of the defense witnesses but, rather, the absence of *any* evidence of actual malice.

judgment when there existed a conflict in testimony concerning events which led a psychiatrist who had been arrested by a policeman to write a letter to the policeman's superiors complaining about the mental fitness of the arresting officer. The conflicting testimony in that case, as interpreted by the Court of Appeals, clearly presented the kind of factual controversy that a jury normally is expected to hear. There was no such conflict in the case at bar.

Moreover, *Berkey* and each of the other cases cited by petitioner addressed the propriety of granting summary judgment. The case at bar involves a directed verdict at the close of all the evidence, not a trial by affidavit.

Because Stack failed to introduce the evidence of actual malice required by well-settled law, the trial court properly directed a verdict against him. Respondent respectfully requests, therefore, that the petition for certiorari be denied.

CONCLUSION

Petitioner's quarrel with the decision of the Court of Appeals is, in fact, a disguised attack on *New York Times v. Sullivan* and its progeny; it is perfectly clear that the Court of Appeals correctly applied the law laid down by this Court. Respondent respectfully suggests, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

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